APPENDIX "A."

Additional Provisions of California Sales and Use Tax Law.

Section 6006.5. "Occasional sale" includes: (a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit;

(b) . . .

Section 6242. The certificate relieves the person selling the property from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds the permit provided for by Article 2, Chapter 2, of this part and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether the property will be sold or will be used for some other purpose.

Section 6244. If a purchaser who gives a certificate makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used. If the sole use of the property, other than retention, demonstration, or display in the regular course of business, is the rental of the property while holding it for sale, the purchaser may elect to pay the tax on the use measured by the amount of the rental charged rather than the sales price of the property to him.

Section 6351. "Exempted from the taxes imposed by this part," as used in this article, means, in case of the sales tax, exempted from the computation of the amount of tax imposed.

Section 6352. There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

Section 6367. There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use, or other consumption in this State of tangible personal property, the transfer of which to the purchaser is an occasional sale.

Section 6402. The storage, use or other consumption in this State of property purchased from any unincorporated agency or instrumentality of the United States, except (a) any property reported to the Surplus Property Board of the United States, or to any agency succeeding to the functions of that board, as surplus property by any owning agency and (b) any property included in any contractor inventory, is exempted from the use tax.

"Surplus property," "owning agency," and "contractor inventory" as used in this section have the meanings ascribed to them in that act of the Congress of the United States known as the "Surplus Property Act of 1944."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 875

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

GEORGE T. GOGGIN, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Respondent.

Petitioner's Reply Brief for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Preliminary Statement	1
Statutes Involved	3
I. The Holding of the Court of Appeals for the Ninth Circuit in the Instant Case Is in Direct Conflict with City of New York v. Jersawit (Second Circuit), 85 Fed. 2d 25. The Court Below Did Not Place Its Decision on the Statutory Exemptions Referred to by Respondent and in Fact Those Exemptions Have No Application in the Instant Case	4
II. The Bankruptcy Court Has No Jurisdiction to Enjoin the State of California from Collecting a Use Tax Directly from Persons Using Property Purchased from a Trustee in Bankruptcy	6
III. To Require George T. Goggin to Collect the Use Tax from the Milton J. Wershow Company Would Not Interfere with the Performance of His Functions as a Trustee in Bankruptcy	9
IV. Miscellaneous Misconceptions of Respondent	9
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases	Pages
Brandtjen & Kluge v. Fincher, 44 Cal. App. 2d (Supp.) 939, 111 Pac. 2d 979	8
Central States v. Luther, 215 Fed. 2d 38	7
City of New York v. Jersawit (Second Circuit), 85 Fed. 2d 25	4
Felt & Tarrant v. Gallagher, 306 U.S. 62	3
Frates v. Oklahoma Tax Comm., 178 Okla. 189, 62 P.2d 514	6
General Trading Company v. Tax Commission, 322 U.S. 335	3
Henneford et al. v. Silas Mason Co., Inc., 300 U.S. 577	3
Krull, In re, 295 Fed. 520 (Dist. Ct., Eastern Dist., New York)	7
Market Street Railway Company v. California State Board of Equalization, 137 Cal. App. 2d 87, 290 P.2d 20	5
McLeod v. Dilworth, 322 U.S. 327	3
Oak Park Cleaners and Dyers, In re, 125 Fed. 2d 420 (Seventh Circuit)	7
Oklahoma Tax Commission v. Texas, 336 U.S. 342 at 353	7
Reconstruction Finance Corporation v. Riverview State Bank, 217 Fed. 2d 455	7
Southern Pacific Company v. Gallagher, 306 U.S. 167	3, 5
Sutter Packing Company v. State Board of Equalization, 139 Cal. App. 2d 889, 294 P.2d 1083 (Hearing denied by California Supreme Court, May 15, 1956)	5

STATUTES

	Pages
California Revenue and Taxation Code	
Section 6005	6, 10
Section 6006.5	5
Section 6014	10
Section 6015	10
Section 6201	10
Section 6202	8, 10
Section 6203	9
Section 6352	4, 5
Section 6367	5
Section 6402	6
California Sales and Use Tax Law (California Revenue and Taxation Code, Sections 6001, et seq.)	1
Judiciary and Judicial Procedure [28 U.S.C.] Section 960 [formerly 28 U.S.C. 124a]	10
Revised Rules of the Supreme Court of the United States, Rule 24(4)	1

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PRELIMINARY STATEMENT

This Reply Brief of Petitioner is submitted pursuant to the provisions of Rule 24(4) of the Revised Rules of the Supreme Court of the United States. It seems advisable to file this brief since Respondent's Brief in Opposition obscures the issues here involved by injecting references to provisions of the California Sales and Use Tax Law which have no application to the problem at hand as evidenced by the fact that they are neither cited nor referred to in the

opinion of the Court below. Moreover, respondent, in inferring that material facts were omitted from the Petition for Certiorari herein, makes reference only to portions of the record which were of so little significance in the disposition of this case that they were not even referred to in the statement of facts contained in any of the briefs filed with the Court below.

Respondent's attempt to restate the issues does not alter the fact that this case presents two basic, independent issues:

(1) Does the bankruptcy court have jurisdiction to enjoin the State of California from collecting directly from a purchaser a use tax arising from the purchaser's use in California of tangible personal property purchased from a trustee in bankruptcy liquidating the assets of a bankrupt estate? In other words, does collection of a use tax directly from such a purchaser constitute a prohibited interference with the bankruptcy proceedings?

(2) May the trustee in bankruptcy be required to collect the use tax from the purchaser in this transaction and transmit it to the State?

In an attempt to justify the decision of the Court below, respondent, at page 6 of its brief, refers to the fact that the Court of Appeals for the Ninth Circuit held that a "use" tax was equivalent to a "sales" tax. This assertion, although unquestionably a correct statement of the holding of the Court below, does not help respondent but only serves to point up the need for a review of the opinion of the Court below. It is very clear that while the sales tax and use tax are complementary, they are not equivalent in legal incidence.

This Court has recognized, on numerous occasions, that because of the difference in legal incidence, a use tax may

be imposed under circumstances in which the imposition of a sales tax would be barred by the provisions of the federal constitution (*General Trading Company v. Tax Commission*, 322 U.S. 335; cf. *McLeod v. Dilworth*, 322 U.S. 327) In the *McLeod* case at page 330 this Court said:

> "* * * A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. * * *
>
> * * * Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State."

It is thus apparent that the Court below, in regarding the use tax as being equivalent to a sales tax, has disregarded the nature of the use tax. The Court below also ignored the holdings of this Court which recognize and give effect to the difference in the legal incidence of the sales tax and the use tax with respect to sales in interstate and foreign commerce (*Henneford et al. v. Silas Mason Co., Inc.*, 300 U.S. 577; *Southern Pacific Company v. Gallagher*, 306 U.S. 167; *Felt & Tarrant v. Gallagher*, 306 U.S. 62).

Since a full discussion of all the errors, misstatements and misconceptions appearing in Respondent's Brief is not feasible at this time, our comments will be confined to some of the more glaring of respondent's inaccuracies.

STATUTES INVOLVED

All of the satutory provisions referred to herein are set forth in full in either the Appendix to the Petition for Certiorari or the Appendix of Respondent's Brief in Opposition.

I. The Holding of the Court of Appeals for the Ninth Circuit in the Instant Case Is in Direct Conflict with City of New York v. Jersawit (Second Circuit), 85 Fed. 2d 25. The Court Below Did Not Place Its Decision on the Statutory Exemptions Referred to by Respondent and in Fact Those Exemptions Have No Application in the Instant Case.

It is clear from even a cursory reading of the opinion of the Court of Appeals for the Ninth Circuit in this case that the Court squarely held the imposition of a use tax on a purchaser from a liquidating trustee would interfere with the performance of the functions of the trustee in bankruptcy, and that the trustee should not collect such tax from the purchaser. It is equally clear that the Court of Appeals for the Second Circuit in *City of New York v. Jersawit* (Second Circuit), 85 Fed. 2d 25, held directly to the contrary. In an attempt to distract the attention of this Court from the embarrassingly apparent conflict between these two cases, respondent suggests that if the Court below had chosen to do so, it might have found some basis for its decision in certain exemptions contained in the California Sales and Use Tax Law. Respondent then proceeds to resurrect arguments which it had previously presented to the Court below based on provisions of the California Sales and Use Tax Law which have no relevance to the problem at hand. These arguments were so devoid of merit that the Court below, in its opinion, did not even bother to refer to the statutory provisions relied on by respondent.

Thus, respondent makes the unsupportable suggestion that Section 6352 of the Revenue and Taxation Code is intended to grant an exemption from use tax whenever the sales tax cannot be constitutionally applied to the sale of the article. Section 6352 of the California Revenue and Taxation Code, to which respondent refers, is actually a combination of exemptions formerly found in the California Re-

tail Sales Tax Act of 1933 and the California Use Tax Act of 1935 which were codified effective July 1, 1943. Section 6352 provides that the sales tax does not apply to transactions which are constitutionally exempt from sales tax and that the use tax does not apply to transactions which are constitutionally exempt from the use tax. It most certainly does not provide what respondent contends, namely, that if the State is constitutionally prohibited from collecting a sales tax, then it cannot collect a use tax either. As this Court is well aware, the basic purpose of the use tax is to complement the sales tax. Thus, the State may apply a use tax in situations in which the State would be constitutionally prohibited from collecting a sales tax from the seller; e.g., the purchase of an automobile by a California resident for use in this State when the automobile was purchased and delivered outside of California. This Court has specifically recognized the function of the California use tax to complement the California sales tax in this manner (*Southern Pacific Company v. Gallagher,* 306 U.S. 167).

Respondent also asserts that the sale here involved is exempt as an "occasional sale" under Sections 6006.5 and 6367 of the California Revenue and Taxation Code. However, the Court of Appeals for the Ninth Circuit recognized that under the California cases of *Market Street Railway Company v. California State Board of Equalization,* 137 Cal. App. 2d 87, 290 P.2d 20, and *Sutter Packing Company v. State Board of Equalization,* 139 Cal. App. 2d 889, 294 P.2d 1083, (Hearing denied by California Supreme Court, May 15, 1956) a sale in the liquidation of the business of a retailer is not exempt as an "occasional sale" (R. 120). The opinion of the Court below was written on the assumption that it was immaterial whether the transaction here involved would be exempt as an occasional sale under the Cali-

fornia statute. The Court, in its footnote 14 (R. 120), indicated that it was not bound by this State Court construction of the California tax if it resulted in the deprivation of a federal right of the taxpayer.

Respondent asserts, moreover, that the sale here involved is exempt under Section 6402 of the California Revenue and Taxation Code. This code section exempts from the use tax property purchased from unincorporated agencies or instrumentalities of the United States only if such property was *owned* by these agencies or instrumentalities as evidenced by the reference in Section 6402 to "owning agency". Section 6402 certainly did not contemplate that privately owned property which was purchased for use in this State was to be exempt from the use tax merely because it was purchased from a trustee in bankruptcy who is liquidating the assets of a private bankrupt for the benefit of his creditors. Federal receivers and trustees are not "federal instrumentalities" for State tax purposes (*Frates v. Oklahoma Tax Comm.*, 178 Okla. 189, 62 P.2d 514). It is to be noted, moreover, that in Section 6005 of the Revenue and Taxation Code which defines the term "person", there are separate references to "trustee in bankruptcy" and to "the United States" which demonstrates that the two terms are not used synonymously in the California Sales and Use Tax Law.

II. The Bankruptcy Court Has No Jurisdiction to Enjoin the State of California from Collecting a Use Tax Directly from Persons Using Property Purchased from a Trustee in Bankruptcy.

In the Petition for Certiorari, at pages 13 to 16 inclusive, it was pointed out that in the instant case the bankruptcy court had exceeded its jurisdiction by attempting to enjoin the collection of the California use tax from the Milton J. Wershow Company, the purchaser of the personal property here involved, because of the Company's storage and use of

the property in this State. This is so since the bankruptcy court had lost jurisdiction of the property nine months earlier when it ceased to be part of the bankrupt estate (*In re Oak Park Cleaners and Dyers,* 125 Fed. 2d 420, (Seventh Circuit); *In re Krull,* 295 Fed. 520, (Dist. Ct., Eastern Dist., New York); and see *Oklahoma Tax Commission v. Texas,* 336 U.S. 342 at 353. In Respondent's Brief in Opposition these cases are neither cited nor discussed. Instead, the respondent attempts to show that the power to enjoin the State of California from taxing the use of property which has ceased to be a part of the bankrupt estate is derived from the jurisdiction of the bankruptcy court to adjudicate the duties of the trustee with respect to the collection of the tax. To support this rather startling proposition, respondent relies on cases such as *Reconstruction Finance Corporation v. Riverview State Bank,* 217 Fed. 2d 455, and *Central States v. Luther,* 215 Fed. 2d 38, holding that a bankruptcy court may adjudicate the conflicting rights of third parties to property if doing so is necessary in order to administer the bankrupt estate. These cases have no application in the instant case, however, since not only are we not here concerned with the conflicting property rights of third parties, but in addition, it clearly is not necessary in order for the trustee to administer the estate of the bankrupt, that the State be enjoined from collecting a use tax from the Milton J. Wershow Company. As pointed out at pages 11, *et seq.* of our Petition for Certiorari, the California use tax is imposed on the purchaser for the privilege of using tangible personal property in this State. Therefore, if the State collects the tax directly from the purchaser, the liability for the tax will be discharged and the administration of the bankrupt estate will not be affected. It follows that the administration of the bankrupt estate does not require that the

State be barred from collecting from persons who are not parties to the bankruptcy proceedings, use taxes imposed for the privilege of using property after it has ceased to be a part of the bankrupt estate.

The suggestion in Respondent's Brief in Opposition that if the use tax were collected by the State directly from the purchaser, the purchaser might then attempt to sue the trustee for the amount of tax is patently unsound. The California use tax is specifically imposed on the purchaser and not on the retailer (California Revenue and Taxation Code, Section 6202). It is the California law that if a retailer, prior to collecting the use tax from the purchaser, transmits the use tax to this State on behalf of the purchaser, he has a cause of action against the purchaser since, under the California statute, the purchaser is primarily liable for the payment of the use tax (*Brandtjen & Kluge v. Fincher*, 44 Cal. App. 2d (Supp.) 939, 111 Pac. 2d 979). If the purchaser, Wershow, paid use tax, he obviously would have no right to collect the use tax from the trustee. Respondent's inconsistency with respect to this issue is nowhere better illustrated than on page 9 of its brief herein. At the top of page 9, respondent asserts quite correctly that if the use tax were to be collected by the trustee, it would merely be added to the purchase price payable by the purchaser, while at the bottom of page 9, respondent inconsistently and erroneously asserts that if the purchaser paid use tax to the State, the purchaser would have a cause of action against the trustee for this tax.

Under the reasoning advanced by respondent, a bankruptcy court would have jurisdiction to enjoin the collection of all taxes arising after property ceased to be part of a bankrupt estate, including real and personal property taxes, since the bankruptcy court would have jurisdiction to deter-

mine the liability, if any, of the trustee for the collection of such taxes. It is respectfully submitted that this is not the law, and that in the instant case the bankruptcy court was without jurisdiction to enjoin the State of California from collecting a use tax from the Milton J. Wershow Company because of that Company's use in this State of tangible personal property purchased from George T. Goggin, the trustee in bankruptcy.

III. To Require George T. Goggin to Collect the Use Tax from the Milton J. Wershow Company Would Not Interfere with the Performance of His Functions as a Trustee in Bankruptcy.

Respondent, in attempting to show that the collection of a use tax would interfere with the performance of the trustee's functions, ignores the facts of the instant case and assumes a hypothetical situation in which a purchaser gives a trustee in bankruptcy a resale certificate and subsequently makes use of the items purchased. Respondent asserts that a trustee would, under such circumstances, have to keep an estate open indefinitely in order to be able to collect the use tax. Of course, no such problem is presented in this case since no resale certificate was given by the purchaser and it is conceded by respondent that in the instant case the property here involved was purchased for use in California and was so used. Moreover, even if a resale certificate had been given, the estate may still be closed in the normal manner and no liability to collect the tax from the purchaser on behalf of the State would arise after the estate was closed (California Revenue and Taxation Code, Section 6203). Accordingly, respondent's argument is without merit.

IV. Miscellaneous Misconceptions of Respondent.

Contrary to contentions of respondent (Respondent's Brief, p. 9), the petitioner is not claiming in this case that

the trustee in bankruptcy, liquidating the assets of the bankrupt estate, is to be taxed as a retailer. This case does not involve a tax on the trustee, but a use tax on the purchaser from the trustee. The question whether the trustee occupies the status of a retailer is important to this case only because the use tax is imposed on persons purchasing tangible personal property from a retailer for use in California (California Revenue and Taxation Code, Sections 6201, 6202). Under the California law, a person engaged in the business of making retail sales is regarded as a "retailer" even though the retail selling operations are carried on outside of this State or even though the seller is otherwise exempt from paying a sales tax to this State, e.g., the United States government, although not subject to the California sales tax for this purpose is a "retailer" within the meaning of the California Sales and Use Tax Law (California Revenue and Taxation Code, Sections 6005, 6014, 6015). In fact, the California use tax is imposed only when the "retailer" who sold to the purchaser upon whom the use tax is imposed is, for some reason, not subject to the California sales tax.

At page 10 of its brief, respondent refers to Title 28 U.S.C. 960 which makes officers or agents conducting a business under authority of a United States Court subject to State and local taxes. Since the instant case involves the imposition of a use tax on a purchaser and does not involve the propriety of the imposition of a tax on the trustee, 28 U.S.C. 960 has no relevance in the problem at hand.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the contentions of respondent are without merit and that certiorari should issue to review the decision of the Court below.

Respectfully submitted,

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